Avocats Sans Frontières or Lawyers without Borders

The Hon Justice James Douglas

Speech for the closing ceremony of the 69th Queensland Bar Practice Course

Inns of Court Level 5

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Congratulations on passing the Bar Practice Course and welcome to the ranks of Queensland barristers. I wish you all long and fulfilling careers.

You may have queried the title to my speech - Avocats Sans Frontières or Lawyers without Borders – and decided that this is Douglas J anxiously parading his enthusiasm for things French – again! Not quite. Nor am I saying anything about the group actually called Avocats Sans Frontières established in 1992 by a group of Belgian lawyers with an international human rights focus or the body called Lawyers Without Borders established in the United States in the year 2000. It encourages lawyers to work as volunteers in pro bono matters. Noble ideals both.

Instead I want to try to expand your legal horizons as some form of compensation for the possible compression of your geographical boundaries associated with commencement of a career at a local bar. More than 40 years ago I was at the stage you are now, contemplating a career at the Bar. One of the limitations that struck me about practice was the local nature of a barrister's practice when compared with the possibilities that seemed open to some of the prospective scientists, engineers and doctors whom I knew as a student. I liked travel and had spent a few years overseas as an associate and post-graduate student including a few months as a law clerk in a London firm.

The law as practised in the 1970s was very much jurisdictionally based and, by that, I mean Queensland even as compared to Australia. The dingo fence was not dismantled until 1989.[1] Young barristers' practices were more local than solicitors'. It was, even then, relatively common for recent graduates to work as solicitors or law clerks in London and quite common for students to do post-graduate degrees in England and, sometimes, in the United States or Canada. It was not common for barristers to practise outside the borders of Queensland. The geographical horizons were pretty limited.

It seemed to me then and since, however, that Australian lawyers were more willing than most to look beyond our own boundaries for inspiration when it came to the development of our own legal system. This was partly at least because we were then still largely dependent on the English common law and, with our federal constitutional system, loosely attached to the American federal system. We were used to looking outward for inspiration. What is more significant for what I propose to talk about shortly is that our trading relationships were starting to change radically to embrace the trade with Asia that influences so much of the business we now do.

There are two subjects in particular that I studied in my final year in 1973 as a part time external student that inspired me to think more broadly. They were public international law and comparative law. I managed to top each subject – unsurprising really because I was the only student taking them. I understand they are more popular options now. They each had a distinct international or supranational focus capable of lifting the lawyers' mental horizons above the merely local. It is the role of comparative law that I wish to talk about particularly today as I suspect that many of you, during the course of your working lives, will need to become aware of the intersection of the common law and other legal systems, notably those based on the civilian systems of Europe, in your daily practice.

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1 See *Street v Bar Association of Queensland* (1989) 168 CLR 461.

Even if that does not happen to you as an individual, an acquaintanceship with comparative law does give one a chance to view our own law in context and understand its structure better. It illustrates the fact that there are other ways to skin a cat in the search of a neat resolution to a legal problem. The study of other legal systems also highlights the importance of structure in a system and coherence in the application of the law. That was a subject dear to the heart of Professor Peter Birks when he compared the taxonomy of Roman law based on a logical organisation of subject matter with the alphabetical taxonomy, as he disparagingly described it, of the common law. An ability to research and understand issues in other legal systems also helps us to cope with newly emerging legal issues in our own society.

What might be some of the emerging legal issues for the balance of this century? I had the chance to reflect on some of those questions a couple of years ago at a conference conducted by the University of Queensland on private law in the 21st century. You can buy the book, edited by Professor Kit Barker and others, now through Hart Publishing.

A common theme of the conference was how best we may respond to increasing complexity in society and legislation by ensuring that our private law remains clear, concise and coherent. The opening keynote address by Professor Andrew Burrows of Oxford dealt with his interest in keeping private law alive and interesting through principled and creative development by the judges, anticipating and sometimes pre-empting legislative change and making the common law more accessible through restatements such as those produced by the American Law Institute. Professor Oliphant addressed possible solutions for the lack of coherence in torts law. Justice Edelman, now, apart from his other remarkable achievements, the editor of McGregor on Damages, discussed vindicatory damages in particular and examined the need to develop a more coherent theory for the law of damages in general.

Should damages be confined to compensation for wrong done to a victim or should it extend to the eradication of other consequences of the wrong?

One of Professor Burrows' and others' concerns was how best to respond to society's increasing complexity. Is the common law or legislation best placed to respond to that increase in complexity? One of the common themes was the need for legislation to fit coherently into our legal systems, not to be just reactive to a specific social problem. This was revisited in respect of the Ipp changes to the system of tort law by our Civil Liability Acts. Another example may be the changes introduced by the Defamation Acts of 2005. Is the limitation placed on a company's right to claim damages for defamation a logical change to the system? It appears to have the result that they now sue in injurious falsehood instead.

What is the role of statutes when the common law has reached a dead end? How can statutory changes best deal with setting up the apparatus of government, preserving markets and changing the distribution of benefits and burdens in society? How do restatements and codification fit in with changes to statutes?

What is the role of lawyers and judges in exposing misbehaviour in the economic system through litigation? How can we best use class actions in this context? Should we codify the law of contract or develop it through restatements as happens in the United States? Should we recognise an obligation of good faith in the performance of contracts and adopt a more contextual approach to interpretation. The focus on clarity and simplicity by advocacy for codification or restatements reflects the perennial quest for clarity and consistency of principle in the system as a whole.

Associated with the talk of codification and the creation of restatements, was the idea that the legal system needed to be explicable to the general public. I have heard some sceptical responses to that ideal from people exposed to too many vexatious litigants in person. Who

from the general public needs to know so much about the law – and won't they get it wrong deliberately anyway?

My response is the reminder that much of our private law, on the common law side, was originally designed to be explicable to civil juries, a system that still exists in some cases here, particularly in Victoria, and generally in the USA and which applies a healthy discipline to those whose obligation it is to explain the law to lay people. As a judge who has to explain our criminal law to jurors I thoroughly appreciate the existence of the Queensland Criminal Code, drafted by Sir Samuel Griffith, and influenced by Stephen's model penal code for India, the Field codes from New York and the then modern Italian Penal Code from the 1890s. It is a great aid to clear expression of our criminal law – except about self-defence!

In a future where the numbers of courts, tribunals and other forms of dispute resolution are only likely to increase, as are the numbers of decisions available freely on the internet, a coherent system facilitating the search for and clear expression of principle will remain a necessary goal. If part of the system goes below the radar as a reaction to the vanishing trial that will create its own problems. Such problems are surfacing already in areas such as the assessment of damages for personal injuries where statutory change and the rise of mediation has led to a dearth of comparable awards.

Another issue I have noticed, perhaps more recently, from experience as a judge over the last nearly 14 years, is what seems to me to be a decline in emphasis by barristers on how particular submissions about the law fit well into our overall system. The focus of most submissions is upon the elaboration of principle through the cases with the emphasis on the cases more so than the principle. That process can be enhanced greatly, in my view, by anchoring the discussion of principle more firmly into the overall structure of the legal system.

Let me say something more about that by going back to 1968 when I began to study law at the University of Queensland. There has always been a tension in the common law between ensuring that the expression and development of legal principle remains coherent and the tendency to lose sight of overarching principle among the wilderness of single instance decisions created by the common law. That wilderness existed when I began to study but was reigned in to some extent by the system of authorised reporting in most common law jurisdictions and less ready access to unreported decisions. That reduced the number of decisions one needed to access to more manageable proportions. Most of the decisions then were also briefer but the problem of the proliferation of decisions was still real.

The technique of research then in use also encouraged a principle-based search for authority through the digest classification system. So much research now seems to be based on the use of case citators. Now, the taxonomy in the common law's digests was criticised by Professor Birks, as I said earlier, as alphabetical rather than conceptual, unlike the Roman law model adopted by civilian codified jurisdictions. Once one had identified the category of the problem, however, the conceptual structure of our digests usefully led one along a path of inquiry focussed on the elaboration of basic principle into more detailed subcategories. One learnt to think conceptually but also to read around a topic and place the decisions in a greater overall context.

Another reflection from my early days as a student is that I fairly rapidly discovered the distinction between students' textbooks on a subject and practitioners' works. My father was a judge with an extensive library which was more accessible than the law school library around exam time. This was long before the internet. At that time, Australian law was more closely linked to English law and the English classical works such as Chitty on Contracts, Bowstead on Agency, Benjamin's Sale of Goods, Clerk and Lindsell on Torts, Charlesworth

on Negligence, McGregor on Damages and other components of the common law library series, were frequently used in practice here. Less so now.

The approach of such works to the statement of principle developed by editors with deep common experience of the academic and practical approach to the law provided not only a useful starting point, but an overall framework of norms within which a legal problem could be conceptualised and, very frequently, readily answered.

The absence of such books until recently from the legal research facilities available on line may be one of the factors leading to an overemphasis in practice on the analysis of individual decisions at some remove from the basic principles from which they are derived.

Is there a large project here for Australian academics and practitioners to help create more leading Australian practitioners' works for the 21st century, proposition and principle based, rather like a Restatement, focussed on the existing law but pointing to how it may develop?

Many of the papers at the conference also dealt with how private law can respond to changes in society, including changes in technology. Professor Getzler asked quite sceptically whether the common law had been shown to be good for finance compared to the civilian systems, given the global financial crisis. Dr Cutts dealt with how the system could respond to the use of Bitcoin and asked if it mattered whether Bitcoin should be characterised as money. Associate Professors Goold and Douglas discussed a "public property" approach to human tissues and Assistant Professor Mik dealt with loss of privacy and loss of autonomy. Professor Chamberlain discussed how snooping as a breach of privacy could be assessed in damages.

Other areas of interest included a discussion of accessory liability in private law, the relationship between tortious liability in negligence combined with the effect of insurance and the interrelationship between injury compensation and social security laws.

Another area some of you might need to deal with, where one can imagine some exquisitely difficult legal issues arising this century, may be those related to the use of autonomous vehicles and artificial intelligence generally. Who will be responsible for accidents involving autonomous vehicles? What if the software propelling them, faced with an inevitable accident, chooses the lesser of two evils, the death of a barrister in the middle of the road rather than that of a mother and three infants on the footpath? Was that the right decision? I expect some future judges will have to decide these and many other unpredictable problems.

From a judicial perspective, one can see that these novel problems that we are certain to face will require a principled approach to their resolution. Whether that resolution is achieved simply by judicial decision or by a combination of judicial decision and legislation, will depend very much on the nature of the issue and how clear it is that society will need to respond to it legislatively at an early stage. The autonomous vehicle problem has already provoked a variety of legislative responses in several American jurisdictions as well as in South Australia.

The developments of the law of tort and contract over the 20th century, often responsive to consumer concerns or the increase in motor traffic accidents and work related accidents, provide examples both of judicial and statutory responses. We judges, assisted by creative and thoughtful barristers, must not shirk the task of developing the law in respect of the new problems of this century in a principled and coherent way.

If the first response to social change is likely to be by a judge rather than a legislature, one thing that can be said is that, even if the judge's decision is regarded as incorrect, it is likely to help provide some guidance and stimulus for legislative change. Lord Denning's judicial career provides several examples of such a result even if some of his decisions have not really stood the test of time.

To perform their duties best, judges will need to keep a clear eye on the development of the law coherently having regard to the structure of the existing legal system, but we will also need to continue to develop an awareness of social and technological change. We need to be capable of understanding the issues likely to arise from such change. We also need to develop a sophisticated approach to statutory construction to deal with the mass of legislation, both existing and likely to exist in the future in response to our rapidly changing society. We need the help of the bar to perform that role as well as possible.

Let me turn back then to comparative law. Where does this fit into the scheme of things?

I have asked you to read Justin Gleeson's paper "Can Australian lawyers of the future afford not to be internationalists?". He makes a strong practical case for practitioners to develop a perspective for the effective resolution of legal problems by resorting to and reflecting on foreign, international or transnational law. He also argues that international and comparative law perspectives should not be left as optional add-ons late in the university curriculum but should be integrated into the teaching of virtually every subject. He illustrates this thesis by a number of examples drawn from contemporary experience in Australia showing how young practitioners can be thrown in at the deep end of problems which have issues extending well beyond our common law and which require an appreciation of legal systems of other countries. He proposes that every university course in law should engage directly with international or comparative law. Nor is it just commercial lawyers who need these skills, he argues, as they extend into crime and family law and other areas that might seem purely domestic.

His argument is actually not new. McGill University in Montreal in Canada is an Anglophone institution in the middle of Francophone Quebec. For a couple of decades now its law school has taught practically all subjects through a comparative method, something

which was resisted initially by many of the academic staff but which is now embraced enthusiastically by them. It makes sense for a law school in a mixed jurisdiction such as Quebec to teach comparatively. I have recently returned, however, from a comparative law conference in Singapore where several authors of papers spoke of the need for the law schools there to teach most of their subjects comparatively, even in their own common law jurisdiction. This was because Singapore aims to become a hub for the resolution of international disputes within its region where many other countries operate under civil law systems rather than common law. Many of their academics and judges see the way forward to achieving that goal by educating their students to understand the systems of the countries with which they trade and do business.

Those are ideas we should keep at the forefront of our own minds. From the vicarious experience I have of the work done by my former associates in recent years, it is clear that much more work, even in Brisbane, is transnational in nature. I have former associates who have worked extensively in China, Japan, Europe, East Timor and France where one of my former associates is a French judge. He and I regularly correspond and debate aspects of our respective systems.

I also know several junior barristers who have been briefed in international arbitrations in jurisdictions like Singapore and even Mexico. Some of our silks have also practised in other countries as well as other states. The possibilities are much wider than used be the case when I started in practice.

Lest you think that these ideas will not help you when next you appear on a drink driving plea in the Inala Magistrates Court, reflect on a decision such as *Downs Investments Pty Ltd (in liq.) v Perwaja Steel Sdn Bhd* [2002] 2 Qd R 462 where Justice Hugh Fraser's opponent did not realise until submissions in the trial that the relevant legislation was not the *Sale of Goods*

Act but the *Sale of Goods (Vienna Convention) Act*. The particular contract of sale had an international element. Your ability to recognise the significance of factual issues such as that will mark you out as a good lawyer, one who should be briefed in more complex and challenging matters. Such an international perspective will become much more common, I believe, during your professional careers.

To emphasise my theme may I set one final test for the members of the course. It comes with a prize which I shall not yet reveal. The prize will go to the first person, a member of this course, to answer accurately my favourite trick question: what is the foreign country closest to Brisbane?